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In the
Supreme Court of the United States
October Term, 1978

No. 78-1510

IN THE MATTER OF THE BOHACK CORPORATION,
Debtor.

JOSEPH BINDER, A WITNESS,
Petitioner,

v.

OFFICIAL CREDITORS' COMMITTEE,
Respondent.

Brief of Respondent Official Creditors' Committee In Opposition To Petition For A Writ Of Certiorari

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In The Matter of The Bohack Corporation,
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JOSEPH BINDER, A WITNESS,
Petitioner,

v.

OFFICIAL CREDITORS' COMMITTEE,
Respondent.

BRIEF OF RESPONDENT OFFICIAL CREDITORS' COMMITTEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, the Official Creditors' Committee of The Bohack Corporation (respectively "Committee" and "Debtor") respectfully submits that the petition of Joseph Binder (respectively "Binder Petition" or "Petition" and "Binder") for the issuance of a writ of certiorari for purposes of reviewing the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on January 10, 1979, should be denied.

OPINIONS

The Court is respectfully referred to pages 1 and 2 and the Appendix of the Binder Petition with respect to the opinions below.

JURISDICTION

The Court is respectfully referred to the presentation on jurisdiction set forth at page 2 of the Binder Petition, but submits as hereinafter more particularly set forth, that the facts of the within controversy are not contained within the ambit of the provisions of Rule 19 of the Rules of the Supreme Court. Accordingly, the issuance of a writ of certiorari would be unwarranted.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The only Federal statute involved in this controversy is Section 7 of the Bankruptcy Act, 11 U.S.C. §25 (1976) which is set forth in part, at page 3 of the Binder Petition and *in toto* in the Appendix of the Binder Petition at page 21a thereof.

QUESTIONS PRESENTED

1. Did the Honorable Jacob Mishler in his memorandum of decision and order dated May 12, 1978, as well as the Court of Appeals for the Second Circuit in its judgment and order dated January 10, 1979, properly interpret Section 7b of the Bankruptcy Act, 11 U.S.C. §25(b) (1976) to include an individual, *to wit,* Binder, who was at the time of the filing of the Petition for Arrangement under Chapter XI of the Bankruptcy Act ("Chapter XI Petition") by the Debtor, a chief executor officer, a director and a stockholder of the Debtor and thereby automatically provide Binder with immunity protection coextensive with the rights afforded under the Fifth Amendment privilege against self-incrimination?

2. Was the *sua sponte* consideration of formal designation of Binder and the direction to the Bankruptcy Judge to

designate Binder to perform the duties of the Debtor, as contained in the opinion and order of the District Court dated May 12, 1978, and as affirmed by the opinion of the Court of Appeals of the Second Circuit, dated January 10, 1979, within the powers of review held by the District Court, in furtherance of the efficient conduct of the Chapter XI proceeding of the Debtor and in furtherance of the economy of the judicial system?

STATEMENT OF THE CASE

The instant controversy simply involves the efforts of the Committee, as the Court designated body representative of all creditors of the Debtor, to determine all facts incident to an approximate $22,000,000.00 discrepancy in the inventory of the Debtor which was determined upon comparison of annual reports of the Debtor for the years 1973 and 1974.* The instant controversy does not, in reality, involve, as alleged by Binder, "the deprivation of an individual's constitutional rights" [P. 4]** but rather involves the full protection of Binder's right against self-incrimination by automatically providing, by virtue of Section 7b of the Bankruptcy Act, protection which has been construed to be coextensive with the Fifth Amendment rights sought by Binder. Further, the within controversy does not involve a "departure from the usual and accepted conduct of judicial proceedings by the District Court and the Court of Appeals" [P. 4] but rather involves the proper exercise of the discretion which rests with the District Court in its review of the decisions of the Bankruptcy Courts and further represents recognition on the part of the District Court for full disclosure in the Chapter XI proceeding and the need for judicial economy.

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*See Page 4, *infra,* for exact figures on inventory discrepancy.

**Numerical references in brackets and preceded by the letter "P" are to the Binder Petition.

On July 30, 1974, the Debtor filed its Chapter XI Petition pursuant to Section 322 of the Bankruptcy Act, 11 U.S.C. §§701-709 (1976) in the United States District Court for the Eastern District of New York [A. 1a, 28a].* At the time of the filing of the Chapter XI petition, Binder was a chief executive officer, director and shareholder of the Debtor. Moreover, he had been a chief executive officer for a period of approximately nine (9) years prior to that time. Binder continued to serve as a chief executive officer (president or vice president) and director for two (2) years *after* the Debtor filed the Chapter XI Petition and while it operated as a Debtor-in-Possession. Further, Binder continued as a stockholder of the Debtor until May 16, 1978, which date (as hereinafter more specifically set forth) was nearly one (1) year subsequent to the Committee's initial examination of Binder.

While serving as a chief executive officer of the Debtor, Binder fully cooperated with the Bankruptcy Court, the Debtor and the Committee. Where necessary, he testified on behalf of the Debtor, as in the case of the efforts of the Debtor in rejecting the collective bargaining agreement with Truck Drivers Local No. 807 of the International Brotherhood of Teamsters. *Bohack Corp. v. Truck Drivers Local Union No. 807, International Brotherhood of Teamsters,* 431 F. Supp. 646 (E.D.N.Y.) *aff'd per curiam,* 567 F.2d 237 (2d Cir. 1977), *cert. denied,* 99 S.Ct., 95 (Oct. 2, 1978).

Shortly after October 10, 1975, the Debtor issues its 1974 annual report [A. 213a-245a]. This report when compared with the Debtor's 1973 annual report [A. 195a-212a] reflected a $22,836,000 reduction of the inventory level as the result of a decrease from a level of $32,858,000, as reported in the 1973

*Numerical references in brackets and preceded by the letter "A" are to the Joint Appendix on appeal in the Second Circuit, which Joint Appendix is part of the record in this case in the possession of the Court of Appeals for the Second Circuit.

report, to the level of $10,022,000, as reported in the 1974 report [A. 202a and 220a]. Based upon this inventory level reduction, the Bankruptcy Court directed that the Debtor and its counsel prepare a report on the inventory shortages. The report of the Debtor to the Court was not filed until May 6, 1976. Shortly thereafter, Binder resigned as an officer and director of the Debtor though, as previously stated, he continued in his capacity as a shareholder.

As the result of the drastic inventory level reduction and since the Debtor was, and is continuing in its efforts to confirm its filed Plan of Arrangement ("Plan"), the Committee began an investigation of the Debtor's financial affairs to assist the Bankruptcy Court in determining the feasibility of the Plan, whether the Plan was in the best interests of the creditors and whether any basis for an objection to the discharge of the Debtor might exist relative to the inventory discrepancy.

In furtherance of the investigations, the Committee, with the assistance of the inventory report of the Debtor the accountants to the Committee and counsel for the Debtor, concluded that it was necessary to examine officers of the Debtor who had particular knowledge of the financial affairs of the Debtor during the time when the inventory reduction occurred.

Accordingly, the Committee prepared and submitted an order to the Bankruptcy Court which was entered by Bankruptcy Judge Parente on July 25, 1977, directing the examination of Binder [A. 51a]. At the time of the entry and service of the order, Binder was no longer an officer and director (as stated aforesaid) but continued as a stockholder of the Debtor.

The first examination of Binder occurred on August 9, 1977. Binder asserted his rights under the Fifth Amendment to the Constitution of the United States. After submission of memoranda of law by counsel to the Committee and counsel for

Binder, Bankruptcy Judge Parente issued his opinion and order dated February 3, 1978 [P. 1a], directing Binder to answer the one question posed on August 9, 1971* [A. 122a].

Further examination of Binder was resumed on February 24, 1978, at which time counsel for the Committee posed numerous questions concerning the Debtor's 1973 and 1974 annual reports. Binder once again refused to answer the questions posed even though one of the questions was whether or not he had signed the annual reports while acting as an officer, director and shareholder of the Debtor [A. 137a]. Bankruptcy Judge Parente ruled on each of the questions and self-incrimination pleas and directed answers to 25 questions [A. 137a-193a]. Binder appealed the order of Bankruptcy Judge Parente dated February 3, 1978 [A. 134a] and both Binder and the Committee appealed the orders of Bankruptcy Judge Parente dated February 24, 1978 [A. 246a and 247a]. At the hearing on the appeal of the order and rulings of Bankruptcy Judge Parente, Judge Jacob Mishler, Chief Judge of the United States District Court for the Eastern District of New York raised *sua sponte* the issue of the immunity afforded by Section 7a(10) of the Bankruptcy Act and the designation of Binder pursuant to Section 7b. The Committee thereupon endorsed the granting of the immunity and agreed that Binder should be formerly designated to perform the duties of the Debtor under Section 7b of the Bankruptcy Act so as to unequivocally provide Binder with the immunity protection he sought and at the time permitting the Committee the opportunity to obtain the information it required in connection with the inventory discrepancy. At this point in time, April 26, 1978, the Committee, the Debtor and the Bankruptcy Court had been attempting to determine the basis for the $22,000,000 inventory discrepancy for approximately 2½ years (1974 annual report issued on or

*Question posed at the August 9, 1977 hearing was "Mr. Binder, were you the president of the Bohack Corporation?"

about October 10, 1975 with the hearing before Chief Judge Mishler having occurred on April 26, 1978).

Chief Judge Mishler granted the parties a brief opportunity to submit memoranda on the issue of designation of Binder pursuant to Section 7b. As opposed to the assertions of Binder at page 8 of the Petition, the Committee, the Debtor and the Bankruptcy Court had made diligent efforts since the determination of the inventory discrepancy to resolve the reasons for that discrepancy. Time was becoming a factor considering the age of the Chapter XI proceeding and quite apparently Chief Judge Mishler recognized the urgency.

In his memorandum of decision and order entered on May 12, 1978 [P. 9a], Chief Judge Mishler concluded that Binder should be designated to perform the duties of the Debtor under Section 7b of the Bankruptcy Act and thus automatically receive the immunity provided by Section 7a(10) of the Bankruptcy Act. Chief Judge Mishler therefore directed the Bankruptcy Judge to designate Binder to perform the duties of the Debtor and answer the questions posed by the Committee on August 9, 1977 and February 24, 1978.

By notice of appeal dated May 19, 1978 Binder appealed the decision of Chief Judge Mishler to the United States Court of Appeals for the Second Circuit [A. 306a] asserting two basic arguments:

(a) the District Court did not have the power to direct the Bankruptcy Court to designate an officer of the Debtor; and

(b) Binder as a former officer, stockholder and director, could not, as a matter of law, be designated to perform the duties of the Debtor.

Binder placed great reliance on the decision of the Court of Appeals for the Second Circuit entitled *In re Bush Terminal Corp.*, 102 F.2d 471 (2d Cir. 1939) ("*Bush Terminal*") for the proposition that a former officer, stockholder or director could not be designated. As expressed by the Committee to Chief Judge Mishler when he considered the reliance by the Debtor on *Bush Terminal,* and as expressed by the Committee to the judges of the Second Circuit when they considered, on two occasions, the same reliance by Binder on *Bush Terminal** and as expressed by the Committee to Mr. Justice Marshall when Binder sought a stay pending the filing of the Petition, the later decision of the Court of Appeals for the Second Circuit entitled *Greene v. Harris,* 240 F.2d 275 (2d Cir. 1957) specifically stated that the discussion in *Bush Terminal* on Section 7b was dictum and further held that former officers, directors and stockholders could be formerly designated to perform the duties of the corporate entity.

The oral argument was held before the Court of Appeals for the Second Circuit on January 9, 1979. Counsel for Binder attempted to present his argument in support of the bald assertion that the District Court could not direct the Bankruptcy Court to designate a former officer of the Debtor to perform the duties of the Debtor. In this regard, the Court of Appeals, through Chief Judge Irving Kaufman, after a few brief exchanges between counsel for Binder and the members of the Court, suggested that counsel for Binder go on to his second point with the further comment that he hoped that the second point of Binder had greater merit than the first point.

Apparently the second point asserted by counsel for Binder, *to wit,* that a former officer, director or stockholder could not be designated, was equally unpersuasive since the Court of Appeals rendered a unanimous decision on January

*The two occasions occurred with respect to the hearing on the merits and the application for a stay pending the filing of the Petition.

10, 1979 (within one day of the oral argument) affirming the decision of Chief Judge Mishler. Though the opinion of the Court of Appeals was only two-paragraphs long, the Court cited the *Greene v. Harris* decision, *supra,* and held that a former officer, director or stockholder could be designated. The Court further held that the District Judge did not lack authority to direct the Bankruptcy Judge to designate Binder to perform the duties of the Debtor under the Bankruptcy Act. [P. 17a]

On January 25, 1979, Binder made a motion to the Court of Appeals seeking a stay of the issuance of that Court's mandate pending his application for a writ of certiorari to this Court. The Court of Appeals again acted with dispatch and denied Binder's motion and on February 13, 1979, issued an order to that effect [P. 19a]. Thereafter and on February 15, 1979, Binder filed an application for the stay of the issuance of the mandate of the Court of Appeals pending the filing of the Petition with Mr. Justice Marshall who, as per advice received from the Clerk of the Supreme Court of the United States by letter dated February 23, 1979, denied the application on February 22, 1979 [A. 21a].

Thus, every Court to whom the arguments which are being asserted by Binder in the Petition were presented, expeditiously denied the request of Binder thereby permitting the Committee, the Debtor and the Bankruptcy Court, subject to further appeals, to conclude those efforts which began in October of 1975 to determine the basis of the $22,000,000 inventory discrepancy.

REASONS FOR DENYING THE WRIT

Binder has suggested that the decisions below endanger the fundamental constitutional rights of Binder. In support of his position, Binder cites this Court to numerous profound quotations from opinions of this Court and other Courts on the protections afforded an individual's constitutional rights. It is

respectfully submitted that this Court has held that the fundamental constitutional rights of Binder have been protected by providing him with immunity coextensive with the Fifth Amendment while, simultaneously with that constitutional protection, providing the Committee, the Debtor and the Bankruptcy Court itself, the ability contemplated by the discovery provisions of the Bankruptcy Act, to determine all the facts and circumstances relevant to the Chapter XI proceeding of the Debtor. As opposed to the assertion of Binder [P. 11], there has been no overruling by the Court of Appeals for the Second Circuit of its prior decision in *Bush Terminal* but rather, a reaffirmation of the later opinion of that Court in *Greene v. Harris, supra,* which held that the discussion of Section 7b of the Bankruptcy Act as contained in *Bush Terminal* was dictum and that a former officer, director or stockholder can be designated under 7b.

The further argument of Binder that the District Court abused its discretion in directing the Bankruptcy Court to designate Binder is totally devoid of merit as evidenced by the numerous opinions on this procedure as well as one of the very opinions cited by Binder in the Petition where a direction was made by the Court of Appeals to the District Court, *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 93 S.Ct. 573 (1973).

Finally, the issues presented herein do not fall within the "character of reasons" set forth in Rule 19 of the Rules of the Supreme Court with respect to the issuance of a writ of certiorari.

I

THE COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY INTERPRETED SECTION 7b OF THE BANKRUPTCY ACT TO INCLUDE OFFICERS, DIRECTORS OR STOCKHOLDERS, WHETHER FORMER OR PRESENT, AND BY THAT INTERPRETATION PROVIDED IMMUNITY RIGHTS TO BINDER COEXTENSIVE WITH THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

Rule 19 of the Rules of the Supreme Court sets forth the "character of reasons" which will be considered by the Court on a petition for the issuance of a writ of certiorari. The within controversy does not involve a situation where a state court has decided a federal question of substance not heretofore determined by this Court, nor does it involve a decision of one Court of Appeals in conflict with a decision of another Court of Appeals on the same matter, nor does it involve a decision of a Court of Appeals which has decided an important state or territorial question which is in conflict with applicable state or territorial law, nor does it involve a decision by a Court of Appeals on an important question of federal law which has not been, but should be, settled by this Court, nor does it involve a Court of Appeals decision on a federal question which is in conflict with applicable decisions of this Court, nor does it involve a departure by a Court of Appeals from an accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. See Rule 19 of the Rules of the Supreme Court. Rather, the judgment and order of the Court of Appeals for the Second Circuit dated January 10, 1979, involves reaffirmation of a prior decision of that Court of Appeals entitled *Greene v. Harris, supra,* which held that a former *de facto* president of the Bankrupt (not truly an officer of the Bankrupt) for a

period of approximately seven or eight weeks *prior* to the filing of the bankruptcy petition could be designated to perform the duties of the Bankrupt. The Court of Appeals for the Second Circuit in *Greene v. Harris, supra,* specifically considered the same argument asserted by Binder, *to wit,* that the majority in the *Bush Terminal* decision, held that Section 7b does not include former stockholders or directors. The Court of Appeals for the Second Circuit in *Greene v. Harris, supra,* specifically stated that such an alleged holding in *Bush Terminal* was dictum and affirmed the decision of the District Court which affirmed the designation of a *former de facto* officer. Thus Binder's reliance on *Bush Terminal* is misplaced. This reliance is even further misplaced since the witness in *Bush Terminal* had never been an officer of the debtor, and, for the three and one-half years prior to the time the debtor filed its petition for reorganization, had neither been a stockholder nor a director of the corporation, nor had any other involvement with the corporation. Unlike the witness in *Bush Terminal,* Binder was a chief executive officer, director and stockholder of the Debtor both before and *after* the Debtor filed its Chapter XI Petition. Binder continued to serve as an officer and director for two (2) years subsequent to the filing of the Chapter XI Petition and as a stockholder until shortly *after* his initial examination. Finally, Binder was an officer, director and stockholder during the period of time under investigation.

In addition, the decision of the Court of Appeals in *Greene v. Harris, supra,* and in the within case, is in total conformity with numerous other decisions permitting the designation of former officers, directors and stockholders and, as in the instance of the individual in *Greene v. Harris, supra,* individuals who were not technically officers, directors or stockholders, to perform the duties of the corporate entity. In the case of *United States v. Weissman,* 219 F.2d 837 (2d Cir. 1955), an individual who was not an officer, director or stockholder, but rather a

financially interested person, was granted immunity protection. In granting the immunity, the Court concluded "We can see no reason for denying to such a person [immunity] protection that is given to the bankrupt, obviously for the purpose of insuring a full disclosure of the facts." (emphasis added) (*Id.* at 841) *See also, In re THC Financial Corp.,* 446 F. Supp. 1337 (D.C. Hawaii 1978) (former officer and director); *In re Bell Refrigeration Corp.,* 169 F. Supp. 62 (N.D. Ohio 1958) (former officer and stockholder); *In re Ron San Realty Co.,* 4 Bankr. Ct. Dec. 97 (Corp. Reorg. Rep.) (S.D.N.Y. 1978) (witness was not an officer, director or stockholder but only a "person in control").

In his Petition, Binder emphasized the constitutionally protected privilege against self-incrimination and in that regard, utilizes quotations from numerous decisions of this Court and several circuit courts. Quite properly, Binder points out a traditional judicial concern on the subject of immunity. However, this Court in *Kastigar v. United States,* 406 U.S. 441, 92 S. Ct. 1953, *reh. denied,* 408 U.S. 931 (1972), has held that the immunity provisions afforded by Section 7b of the Bankruptcy Act provide use and derivative use immunity which is fully coextensive with the Fifth Amendment privilege against self-incrimination. *See also, United States v. Dornau,* 491 F.2d 473 (2d Cir.), *cert. denied,* 419 U.S. 872 95 S.Ct. 132 (1974).

Binder states in Page 13 of the Petition that:

> "the inescapable logical progression of the court of appeals' decision is that *anyone* who *ever* held a responsible position in a corporation may be designated and given immunity."

Such a statement is unfounded when one considers the short but precise decision of the Court of Appeals [P. 18a] which states in the second paragraph:

> "2. Since Binder was President of Bohack during the period relevant to the Creditors Committee's investigation, and remained an officer for two years after the Chapter XI petition was filed, it was proper to designate him under Section 7 of the Act, despite the fact that he was no longer an officer of the corporation at the time of Judge Mishler's decision. *See Green v. Harris,* 240 F.2d 275 (2d Cir. 1957); *United States v. Weissman,* 219 F.2d 837, 841 (2d Cir. 1955)."

Thus, the Court of Appeals did not suggest that "anyone who ever held a responsible position" can be designated and given immunity but rather considered the fact that Binder was a chief officer (President), acted in that capacity during the period relevant to the investigation and remained an officer for two (2) years after the Chapter XI Petition was filed. Thus, with those qualifications, the Court of Appeals held that Binder could be designated. The Court of Appeals, in that very short paragraph, recognized the need for full disclosure in the Chapter XI proceedings where a debtor seeks to be rehabilitated and discharged of all obligation. Chief Judge Mishler expressed the purpose of designation and automatic immunity when he stated:

> "We agree with the Committee that Binder should be designated under Section 7b to perform the duties of the debtor and thereby compelled to testify under the protective immunity of Section 7a(10). This procedure is fully consonant with, and would best implement, the Congressional policy which underlies the statutory grant of immunities to bankrupts: to encourage a full disclosure of the affairs of the debtor and thereby insure a proper administration of the estate, whether the goal be distribution or, as in the instant proceedings, rehabilitation." [P. 11a]

Binder, at Paragraph 14 of the Petition, suggests that the further effect of the decision of the Court of Appeals in this case would be that individuals will "thrust themselves upon the

Court as the Bankrupt in order to obtain immunity." As was stated in the *United States v. Castellana,* 349 F.2d 264 (2d Cir. 1965), *cert. denied,* 383 U.S. 928 (1966), an individual must be designated in order to obtain immunity. (Cf. *United States v. Coyne,* 587 F.2d 111 (2d Cir. 1978). Thus, one could not simply "thrust themselves" and thereby obtain the immunity. The particular court involved would, in its discretion, consider the elements present, the interest of the creditors, a possible creditors' committee, and a possible trustee-in-bankruptcy in designating and affording immunity. Such considerations were given by Chief Judge Mishler in his designation of Binder.

Binder states, at Page 17 through 19 of the Petition, that the two decisions cited by the Court of Appeals herein, *to wit, Greene v. Harris, supra,* and *United States v. Weissman, supra,* are clearly distinguishable from the present case and require, due to unique circumstances, a "narrow exception" to the alleged *Bush Terminal* rule. The Court of Appeals in this case and in *Greene v. Harris, supra,* has made it crystal clear that there is no *Bush Terminal* rule. Rather, there is the *Greene v. Harris* principal, *supra,* which principal, as stated aforesaid, has been followed in other circuits. Simply becoming a former officer (such as by resignation prior to an examination of bankruptcy) does not eliminate one's ability to be designated to perform the duties of the bankrupt (debtor) under Section 7b if such designation will assist in the orderly and efficient administration of the bankrupt estate by encouraging a full disclosure of the affairs of the debtor.

II

THE DESIGNATION OF BINDER BY THE DISTRICT COURT AND THE DIRECTION TO THE BANKRUPTCY COURT WAS PROPER

Binder alleges that Chief Judge Mishler abused his discretion when he raised the issue of Binder's designation, *sua sponte,* since his decision ran " . . . directly counter to the case law in the Second Circuit and other Circuits." [P. 20]. However, Binder overlooks the fact that by virtue of Section 2(a)(10) of the Bankruptcy Act, the records, findings, and Orders of the Bankruptcy Judge may be confirmed, modified, reversed or returned by the District Court Judge to the Bankruptcy Judge for further proceedings. In accord with that section is Rule 810 of the Rules of Bankruptcy Procedure. Under this broad grant of power, the District Court is not barred from considering *any* issue presented by the record, even though it was not discussed by or before the Bankruptcy Judge. 2 *Colliers on Bankruptcy* ¶39.28 at p. 1521 (14th ed.); *Rosehedge Corporation v. Sterett,* 274 F.2d 786 (9th Cir. 1960); *In re Kellar,* 192 F. 830 (1st Cir. 1912); *In re Samuel Wilde's Sons,* 144 F. 972 (2d Cir. 1906); *In re Dunn,* 251 F. Supp. 637 (M.D. Ga. 1966). Since the relationship between the Bankruptcy Judge and the District Judge is unique under the scheme of the Bankruptcy Act, the District Judge may *direct* the Bankruptcy Judge to take whatever action is appropriate under the circumstances. *In re Stirling Homex Corp.* No. 78-5025, *slip. op.* at 386 (2d Cir., Nov. 22, 1978) *aff'd as modified, slip op.* 1243 (2d Cir., Jan. 30, 1979); *In re Ostrer,* 318 F. Supp. 984 (E.D.N.Y. 1970); *In re Terrace Superette, Inc.,* 299 F. Supp. 371 (W.D. Wisc. 1964). These cases are uniformly clear that Chief Judge Mishler had the authority and the power to raise the issue of designation of Binder *sua sponte* at the hearing on the appeal before him and direct the designation. As previously stated, the Court of Appeals recognized Chief Judge Mishler's authority in its decision rendered on January 10, 1979, wherein the Court held:

"Judge Mishler did not lack authority to order the Bankruptcy Judge to designate Binder to perform the duties of the Debtor under the Bankruptcy Act. [citations omitted]" [P. 18a]

To say that the Court of Appeals has sanctioned an invasion of the Bankruptcy Judge's discretionary and supervisory power over the administration of bankruptcy matters is to misconstrue the power of the District Court for self-serving purposes. Chief Judge Mishler was completely within the parameters of his authority by raising the issue of designation *sua sponte,* and directing the Bankruptcy Judge to designate Binder. Such direction was simply a matter of proper judicial discretion and economy in recognition of a problem for which a practical solution was provided for by Section 7b of the Bankruptcy Act. One of the very cases cited by Binder, *to wit, Ricci v. Chicago Mercantile Exchange, supra,* in connection with the attempt of Binder to analogize the Bankruptcy Court to the "primary jurisdiction" concept in the administrative agency field, supports the concept of a direction by an appellate court to a lower court. Specifically, at Page 575 of that decision, a direction to stay any further proceedings was made by the Court of Appeals to the District Court. Thus, it is consonant with the concept of judicial economy and appellate powers that appellate courts can direct a court of lower jurisdiction, as in the case of the direction of Chief Judge Mishler to the Bankruptcy Judge, to take certain action.

As opposed to the suggestion of Binder at Page 21 of the Petition, by citing this Court to the decisions of *In re Ira Haupt & Co.,* 379 F.2d 884 (2d Cir. 1967); *In re Rosenfeld-Goldman Co.,* 228 F. 921 (D. Mass. 1915); *In re Naftalin & Co.,* 315 F. Supp. 463, 465 (D. Minn. 1970); *In re Gowen,* 328 F. Supp. 789, 791 (E.D. Mo. 1971), the decision of Chief Judge Mishler did not involve a consideration of complex issues of fact which the

District Court might wish to have the Bankruptcy Court, as the trier of facts, consider, but rather involved, as stated aforesaid, the power of the District Judge to consider any issue presented by the record before it whether that matter was discussed by or before the Bankruptcy Judge. The issue before Chief Judge Mishler was an issue of law on the designation of an officer, not a complex issue of fact. Thus, any reliance on these decisions is misplaced.

Binder thereafter suggests that the functions of a Bankruptcy Judge are analogous to the functions of an administrative agency. The very quote utilized by Binder from the *Far East Conference v. United States* decision, 342 U.S. 570, 574-76 (1952), clearly sets forth the fact that the concern of this Court in that decision pertained to the expertise of the Federal Maritime Board on a dual rating system and the concern that the issues of fact relative to the Federal Maritime Board were not "within the conventional experience of judges. . . ." The issue before Chief Judge Mishler was not an issue of fact but rather an issue of law involving a provision of the Bankruptcy Act. Further, the record taken before Judge Mishler [A. 252a] reflects his full familiarity with the Chapter XI proceeding of the Debtor arising out of prior matters heard before him, including the controversy involving the Debtor's efforts in rejecting the collective bargaining agreement with Truck Drivers Local #807 of the International Brotherhood of Teamsters. *Bohack Corp. v. Truck Driver's Local Union No. 807, International Brotherhood of Teamsters, supra.* Thus, the parallel to the administrative agencies is totally misplaced.

The further decisions relied upon by Binder in support of the asserted proposition that Chief Judge Mishler should have refrained from deciding issues not presented first to the Bankruptcy Court are also unwarranted. In the case of *In re Fowler,* 407 F. Supp. 799 (W.D. Okla. 1975), the court declined

to consider *factual* issues pertaining to the perfection of a security interest on the grounds that those factual issues were not properly presented on appeal. However, in the course of that decision, the court did refer to the fact that the decision on whether or not to consider issues not presented to the court below is a discretionary decision, and further, referred to the case cited above, *to wit, In re Dunn, supra,* for the proposition that some courts have held that a District Court may consider any issue presented in the record. The obvious emphasis in the Fowler decision, *supra,* and the other decisions of *In re Unikraft Homes of Virginia, Inc.,* 370 F. Supp. 667 (W.D. Va. 1974); *In re Ira Haupt & Co.,* 287 F. Supp. 318 (S.D.N.Y.), *appeal dismissed per curiam,* 405 F.2d 493 (2d Cir. 1968); *In re Nassau Press, Inc.,* 259 F. Supp. 666 (E.D.N.Y.), *aff'd on other grounds per curiam,* 369 F.2d 700 (2d Cir. 1966), cited by Binder, is on whether or not the matter before the appellate court involved a factual issue and whether the court deemed appropriate the consideration of that factual issue or a remand of that issue to the lower court. It must be noted that Chief Judge Mishler was the very Judge who decided the *In re Nassau Press, Inc., supra,* case, which is cited by Binder for the proposition that the District Court should refrain from deciding an issue not presented to the Bankruptcy Court. Chief Judge Mishler, in the *Nassau Press, Inc., supra,* case, was faced with issues of *fact* pertaining to setoffs and security interests and, accordingly, in the exercise of his discretion, remanded that issue for hearings. In the within case, Chief Judge Mishler was not faced with an issue of fact but rather an issue of law, and in the proper exercise of his discretion, directed the designation of Binder.

Finally, Binder suggests that the citation by the Court of Appeals to the decisions of *In re Ostrer, supra,* and *In re Stirling Homex Corp., supra,* was insufficient to support the position of the Court of Appeals that the District Court could direct the Bankruptcy Court to take certain action. It must be noted that the authority for such direction is contained in all of the cases

cited above by the Committee and, further, the *Ostrer* decision, *supra,* refers with approval to the decision of *In re Terrace Superette, supra,* wherein the Court stated:

> "This [district] Court, with its power of review over the Referee in the proceedings had before the Referee can *direct* the Referee to take such action in respect to bankruptcy proceedings as the Court deems appropriate.' [emphasis added]

Although the *Stirling Homex Corp.* decision, *supra,* to a great extent, involved issues other than the issue pertaining to directions to a lower court, all elements of the decision led to the decision on direction. The Court, in *Stirling Homex, supra,* was cognizant of the requirements of judicial economy and recognized the power of direction contained in an appellate court. Binder then cites this Court to the decision of *United States v. Coyne, supra,* and suggests that that opinion renders the *Stirling Homex, supra,* language particularly inexplicable. The reading of the recent *United States v. Coyne* decision, *supra,* rather than suggesting that the citation to the *Stirling Homex* decision, *supra,* is "inexplicable," supports the fact that the Court of Appeals for the Second Circuit in the within case, by virtue of its rather brief and "to the point" decision, believed that the issues before it were not and are not of the magnitude suggested by Binder. In the *United States v. Coyne* decision, *supra,* the Court of Appeals quite obviously believed that the issues before it (immunity where the officer whose testimony was being utilized had not been specifically designated), were of sufficient magnitude to require an extensive dissertation on the legislative history supporting the appropriate sections of the Bankruptcy Act and on cases construing those sections. The *United States v. Coyne* decision, *supra,* further supports that which was decided and directed by Chief Judge Mishler. By virtue of the decision of Judge Mishler and

his direction to the Bankruptcy Court, there can be no question as raised in *United States v. Coyne, supra,* as to the immunity afforded Binder. Thus, the *United States v. Coyne* decision, *supra,* is fully supportive of the very subject of this controversy, *to wit,* the designation by Chief Judge Mishler and the resulting direction made by Chief Judge Mishler to the Bankruptcy Court.

There is no issue before this Court of a magnitude to require the issuance of a writ of certiorari.

CONCLUSION

For all of the reasons set forth above, it is respectfully requested that the Petition be denied.

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Respectfully submitted,

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